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Supreme Court, U.S.
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No. 04-1381

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,

Petitioners,

v.

WAYNE SMITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHEM-TRONICS, INC.

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LIST OF PARTIES

The Petition does not completely list the parties. It excludes Union Pacific Railroad, which was a defendant in the trial court, an appellee in the Seventh Circuit and is a Respondent pursuant to Supreme Court Rule 12.6. Union Pacific Railroad waived its right to file a brief in the Seventh Circuit and has not filed a pleading in the Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Respondent Chem-Tronics, Inc. has no parent corporation and that no publicly held company owns 10% or more of its stock.

COUNTERSTATEMENT OF THE CASE

Contrary to the Petitioners' arguments, the Seventh Circuit's decision does not create new law on any issue and certainly does not hold or even suggest either that as a matter of law a settlement class cannot be certified when a litigation class cannot be certified, or that one litigant cannot be an adequate representative for a previously certified litigation class. All that the Seventh Circuit held in this appeal from the preliminary approval of a proposed class settlement was that a putative settlement class representative has a burden of demonstrating that he was an adequate representative before he procured a class settlement. Given its intimate exposure to the deep history of this and related litigation, the Seventh Circuit's narrow holding in the face of boilerplate trial court findings is virtually routine.[1]

This is one of only a relative handful of state and federal class actions arising from the installation of fiber optic cable on railroad rights-of-way without ascertaining land title and obtaining permission from the fee owners of the land. *See*, Petition at 4; Appendix to Petition (hereinafter "App.") at 2a. In an effort to imbue this case with an aura of national import, Petitioners hyperbolically suggest — without any record support — that these actions seek to have the fibers "stripped out of their physical beds." But that is arrant nonsense. The actions are merely trespass claims seeking the standard damages and other similar relief afforded by state law.

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[1] The holding is: "We agree with the intervenors that they are inadequately represented by the settling plaintiffs. We therefore VACATE the nationwide class certification and the district court's injunction against competing class actions and REMAND the case to the district court for further proceedings." App. 5a.

The trial court's stock finding was: "The Plaintiffs, represented by counsel experienced in complex litigation, will fairly and adequately protect the interests of the class." App. 13a.

Previous attempts to certify a monolithic class in related cases were successfully *opposed* by Petitioner Sprint Communications Company, L.P., ("Sprint") including a prior case in the Seventh Circuit where that court agreed with Sprint that the trial court failed to make necessary findings of the class representative's adequacy under Rule 23(a) and (b)(3). *See, Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001).

For their part, none of the putative settlement class representatives below or their counsel even did enough work in any of their scattered cases to approach class certification status. The record below was that the settling plaintiffs had abandoned the prosecution of most of their cases at an early date (*See*, R.346, Exhibit D) and they were rejected as class representatives on the rare instances when the issue was broached. *See, e.g., Chambers v. Sprint Corporation,* 2002 U.S. Dist. LEXIS 22621 (W.D. Wis. March 2, 2002). "Disarmed" in relation to negotiating a class settlement scarcely begins to describe them.

By comparison, as the Seventh Circuit noted, Chem-Tronics and others had successfully obtained appropriate class certification and were marching determinedly forward, being on the "eve of trial" in Kansas and Tennessee, respectively. *See*, App. 4a. As a result, the settlement class representatives faced being made irrelevant in the litigation, which drove them to pull up stakes in the Northern District of Illinois when the trial court proved chary to their settlement overtures (and where Seventh Circuit review was inevitable) and gallop for judicial approval of their proposed national class settlement to an unwitting District Court in Oregon. The Oregon court was not gulled, however, and dismissed the proposed amended complaint in that action as a sanction for "judge shopping" and recommended that the parties return to their fate in Illinois. *Zografos v. Qwest Communications Corp.*, 225 F.Supp.2d 1217, 1223 (D.Or. 2002). Just as any court would, the Seventh Circuit found this skulking behavior on the part of settlement class representatives to be deeply troubling. *See*, App. 3a.

To make matters worse, during all of the foregoing scramble for approval of a flawed settlement, the parties in the trial court excluded the appealing Respondents, the other intervenors, and all other plaintiffs' counsel from all settlement discussions. The result was predictable: a sweetheart monolithic class settlement that ignored intra-class legal and factual differences perceived by the Seventh Circuit in *Isaacs*.

Given a close look at all of this byzantine maneuvering, it was inevitable that the Seventh Circuit would conclude that the adequacy of representation problems that it had perceived earlier in *Isaacs* still had not been met *and* that the sweetheart settlers were "disarmed" in every sense and could not represent the interests of parties (that is, Chem-Tronics and others) that did wield an actual threat of litigation. *See*, App. 4a. Given the failures and carnival-like performances of the settlement class representatives here, the reversal and decertification were almost certain.

On request for *en banc* review, no member of the Seventh Circuit, including the dissenter, Judge Cudahy, voted for reconsideration of the majority result.

REASONS FOR DENYING THE PETITION

Neither of the two questions proposed by the Petitioners warrants review of this case. Each is premised on factually incorrect statements by the Petitioners of the Seventh Circuit's holding. The result here was fact-driven based upon a record of actual inadequacy, not based on doctrinal deficiency.

All the Seventh Circuit did was rule (consistent with Petitioner Sprint's successful earlier assertions to that court in *Isaacs*) that class member legal and factual differences in national trespass damage cases raised serious adequacy issues that needed to be resolved before any national settlement class could be certified. As Rule 10 of this Court admonishes, fact-

intensive discretionary rulings are not appropriate for review by writ of certiorari.

The fact-intensive nature of the Seventh Circuit's holding is manifest. Petitioners selected disarmed and truly hapless negotiating partners instead of Chem-Tronics and the other successfully litigating intervenors, which invariably weakened the result. Adequate representation of absent class members is the *sine qua non* of due process. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Adequacy to represent the class is first and foremost measured by whether counsel and client can be counted upon to honestly fulfill fiduciary obligations to the class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Mirfasihi v. Fleet Mort. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Inept and unsuccessful efforts to conduct class proceedings in a case will make a representative inadequate. *See, e.g., Greisz v. Household Bank*, 176 F. 3d 1012, 1013 (7th Cir. 1999); *Hatch v. Reliance Ins. Co.*, 758 F. 2d 409, 416 (9th Cir. 1985).

Chem-Tronics and the other appealing intervenors presented many examples to the Seventh Circuit of how the putative representatives procured a settlement that failed to protect the best interests of the members of the class. The Seventh Circuit needed to go no further than the prime issue of representation to see the need for reversal, but had it gone further and reviewed all the settlement terms, the result would have been just the same: reversal.

Predictably, the Petitioners cloak themselves with the presumed virtues of "any settlement in a litigation storm" by arguing general principles of fairness. But this Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), refused to permit the fairness inquiry under Rule 23(e) to "eclipse" Rule 23(a) and (b) and thereby permit both class counsel and this Court to

be disarmed. *Id.*, at 621. To adopt Petitioner's approach would just encourage more scoundrelly behavior by settlement class representatives of the sort seen by the Seventh Circuit here.

The Seventh Circuit's narrow holding was factually based and wholly consistent with this Court's admonitions that Class member protections should not be subverted to "chancellor's foot" appraisals of fairness. *Amchem*, 521 U.S. at 621. The settlement class representatives here were plainly inadequate by any measure recognized by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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